A

Amsiah Rahim v Borneo Samudera Sdn Bhd

B HIGH COURT (SANDAKAN) — SUIT NO SDK-22–35/6 OF 2012
CELESTINA STUEL GALID J
31 JANUARY 2021

C *Tort — Trespass to land — Damages — Plaintiff claim for damages against defendant over trespass to land — Whether plaintiff was entitled to compensation — Whether plaintiff was entitled to claim for general damages, punitive and exemplary damages*

D The plaintiff, the registered owner of the land held under NT 113039115, in the District of Lahad Datu, Sabah ('the land') had sued the defendant for trespass over the land. The High Court granted the plaintiff's claim but only awarded a nominal sum of RM1,000 as damages. The plaintiff appealed and it was allowed by the Court of Appeal. The case was remitted to the court for the assessment of damages. The issues were: (a) whether the plaintiff was entitled to
E compensation due to the defendant occupying the land before 1998 and had continued to do so until 12 December 2014; and (b) whether the plaintiff was entitled to claim for general damages, punitive and exemplary damages as prayed in encl 7. The plaintiff's claim for damages was very much grounded upon the allegation that the plaintiff was deprived of the use of the land and not
F that the defendant had profited from using the land. The defendant submitted that the plaintiff was precluded from retreating from the position the plaintiff had adopted. The plaintiff contended that there was no difference between the two measures of damages and the plaintiff should be awarded for the trespass even without proof of damage.

G

Held, dismissing the plaintiff's claim with costs subject to allocator:

(1) Although the plaintiff used the term 'compensatory damages', the plaintiff was not seeking to be compensated for what she had lost, but
H instead, for restitutionary damages, ie the profits obtained by the defendant in working on the plaintiff's land for the period of the trespass. The plaintiff's claim of RM563,678.55 was not only made up of the sum of RM407,282.19, allegedly admitted as being the defendant's profit gained from the land, but a further sum of RM156,396.36 which the
I plaintiff contended was more representative of the 'actual profits' made by the defendant (see paras 10 & 27)

(2) It was not the plaintiff's case that the plaintiff did not suffer any loss so that the plaintiff should be compensated by the grant of a restitutionary award based on the defendant's personal gain. It was trite law that the

relevant principle in law of tort was to restore the injured party to the situation which would have prevailed had no injury been sustained. The principle that the award of damages was not to include any element of profit similarly applied in an action for tort. The plaintiff could not shift gear and claimed for damages on the basis of the defendant's gains. In any event, the plaintiff's pleaded case and evidence did not support such claim. The fact that the plaintiff was able to identify the financial loss meant that there was no justifiable reason to alow the plaintiff a gains based remedy (see paras 34 & 36–37).

(3) The plaintiff's claim for the sum of RM563,578.55 as compensatory damages failed. Consequently, the claim for punitive and exemplary damages which was premised on the said sum claimed of RM563,678.55 also failed (see para 38).

[Bahasa Malaysia summary

Plaintif, pemilik tanah yang didaftarkan di bawah NT 113039115, di Daerah Lahad Datu, Sabah ('tanah tersebut') telah menyaman defendan kerana menceroboh tanah tersebut. Mahkamah Tinggi membenarkan tuntutan plaintif tetapi hanya memberikan ganti rugi nominal sebanyak RM1,000. Plaintif membuat rayuan dan dibenarkan oleh Mahkamah Rayuan. Kes itu diserahkan ke mahkamah untuk penilaian kerosakan. Isu-isu adalah: (a) sama ada plaintif berhak mendapat pampasan kerana defendan telah menduduki tanah tersebut sebelum tahun 1998 dan terus melakukannya sehingga 12 Disember 2014; dan (b) sama ada plaintif berhak menuntut ganti rugi am, punitif dan ganti rugi teladan seperti yang dimohon di lampiran 7. Tuntutan plaintif untuk ganti rugi berdasarkan pada dakwaan bahawa plaintif telah dilucutkan dari penggunaan tanah tersebut dan bukan bahawa defendan telah mendapat keuntungan dari menggunakan tanah tersebut. Defendan menyatakan bahawa plaintif dilarang menarik balik daripada posisi yang telah digunapakai oleh plaintif. Plaintif berpendapat bahawa tidak ada perbezaan antara kedua-dua perkiraan ganti rugi dan plaintif harus dianugerahkan untuk pencerobohan walaupun tanpa bukti kerosakan.

Diputuskan, menolak permohonan plaintif dengan kos tertakluk kepada alokator:

(1) Walaupun plaintif menggunakan istilah 'ganti rugi pampasan', plaintif tidak memohon untuk mendapatkan ganti rugi atas apa yang telah hilang, tetapi sebaliknya, untuk ganti rugi restitusi, iaitu keuntungan yang diperoleh oleh defendan ketika bekerja di tanah plaintif untuk tempoh pencerobohan. Tuntutan plaintif berjumlah RM563,678.55 bukan hanya terdiri dari jumlah RM407,282.19, yang didakwa diakui sebagai keuntungan defendan yang diperoleh dari tanah tersebut, tetapi sejumlah wang tambahan sebanyak RM156,396.36 yang didakwa oleh

plaintif mewakili 'keuntungan sebenar' yang dibuat oleh defendan (lihat perenggan 10 & 27).

(2) Ia adalah bukan tuntutan plaintif bahawa plaintif tidak mengalami kerugian sehingga plaintif harus diberi ganti rugi dengan pemberian restitusi berdasarkan keuntungan peribadi defendan. Adalah undang-undang yang ditetapkan bahawa prinsip yang relevan dalam hukum tort adalah untuk mengembalikan pihak yang rugi ke situasi yang akan berlaku jika tidak ada kerugian yang dialami. Prinsip bahawa pemberian ganti rugi tidak termasuk unsur keuntungan diterapkan dalam tindakan untuk tort. Plaintif tidak dapat menukar tuntutan dan menuntut ganti rugi berdasarkan keuntungan defendan. Walau bagaimanapun, kes yang diplidkan dan bukti plaintif tidak menyokong tuntutan tersebut. Fakta bahawa plaintif dapat mengenal pasti kerugian kewangan bermaksud bahawa tidak ada alasan yang wajar untuk membenarkan plaintif mendapat remedi berdasarkan keuntungan (lihat perenggan 34 & 36–37).

(3) Tuntutan plaintif sejumlah RM563,578.55 sebagai ganti rugi pampasan gagal. Akibatnya, tuntutan ganti rugi punitif dan teladan yang dibuat berdasarkan jumlah tuntutan yang dituntut sebanyak RM563,678.55 juga gagal (lihat perenggan 38).]

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697; [2007] 6 CLJ 93, FC (refd)

Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd [2018] 5 MLJ 255, CA (refd)

Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors [2007] 1 MLJ 225; [2007] 1 CLJ 1, CA (refd)

Attorney General v Blake (Jonathan Cape Ltd, third party) [2000] 4 All ER 385, HL (refd)

Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others [2007] EWHC 2394 (Ch), Ch D (refd)

Inverugie Investments Ltd v Hackett [1995] 1 WLR 713, PC (refd)

Johandra Realty Sdn Bhd dan satu lagi lwn Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia dan satu lagi [2020] MLJU 1972, CA (refd)

Lim Ah Moi v Ams Periasamy a/l Suppiah Pillay [1997] 3 MLJ 323, CA (refd)

Ministry of Defence v Ashman (1993) 66 P & CR 195, CA (refd)

Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd's Rep 359, QBD (distd)

Stoke-on-Trent City Council v W & J Wass Ltd [1988] 3 All ER 394, CA (refd)

Swordheath Properties Ltd v Tabet [1979] 1 WLR 285, CA (refd)

Villa Putra Management Corp v Mayland View Sdn Bhd [2015] 9 MLJ 779; [2014] 1 LNS 1096, HC (distd)

Edwin Tsen (Caroline Hee with him) (Tan Pang Tsen & Co) for the plaintiff.
Ho Kin Kong (Jeremy Ho with him) (Ho Chong Yong) for the defendant.

Celestina Stuel Galid J:

INTRODUCTION

[1] The matter before the court is the assessment of damages pursuant to the order of the Court of Appeal dated 19 January 2017 ('COA order').

[2] The plaintiff, the registered owner of the land held under NT 113039115, in the District of Lahad Datu, Sabah ('the land') had sued the defendant for trespass over the land.

[3] After a full trial, on 17 November 2015, the High Court granted the plaintiff's claim but only awarded a nominal sum of RM1,000 as damages. The plaintiff appealed.

[4] The Court of Appeal allowed the plaintiff's appeal and remitted the case back to this court for the assessment (of damages).

AGREED FACTS

[5] The parties have agreed to the following facts:

(1) The Plaintiff is the registered owner of the Land since 11.06.1998;

(2) By a letter dated 23.02.2012 from the Plaintiff's solicitors to the Defendant, the Plaintiff requested the Defendant to deliver possession of the Land to the Plaintiff within 14 days; and

(3) The Defendant had been in possession of the Land even before the Plaintiff had purchased the Land and had only delivered possession to the Plaintiff on 12.12.2014.

AGREED ISSUES

[6] The parties identified the following issues for the court's determination in these proceedings:

(1) Whether the Plaintiff is entitled to compensation due to the Defendant had been occupying the Land before 1998 and has continued to do so until 12.12.2014; and

(2) If so, what is the amount of damages the Plaintiff is entitled to?

[7] In addition, the plaintiff added the following issue:

> Whether the Plaintiff is entitled to claim general damages and/ punitive and exemplary damages as prayed for at Enclosure 7, prayer (iv) of the Amended Statement of Claim dated 28.08.2012.

[8] The defendant is not agreeable to the additional issue.

THIS COURT'S DECISION

[9] In the plaintiff's written submission (para 19.1, encl 124), the plaintiff had prayed for the following:

(i) compensatory damages of RM563,678.55 to be awarded to the Plaintiff being the profits made by the Defendant from the Land;

(ii) exemplary damages of RM140,919.64 amounting to 25% of the compensatory damages to be awarded to the Plaintiff (RM563,678.55 x 25% = RM140,919.64);

(iii) Costs of RM30,000.00 (costs for PW1 RM10,000.00 and costs for the assessment proceedings RM20,000.00);

(iv) Interest at 5%pa under Section 11 of the Civil Law Act 1956 with effect from the date of trespassing until judgment and thereafter statutory interest at the rate of 5%pa from date of judgment until full payment;

(v) Prayers (i) to (iv) are to be paid to the Plaintiff within one (1) month from the date of the Order.

[10] Although the plaintiff used the term 'compensatory damages', a reading of the plaintiff's submission on this head of claim shows that the plaintiff is in fact not seeking to be compensated for what she has lost (in this case, the use of the land) (see *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697; [2007] 6 CLJ 93) but instead, for restitutionary damages ie the profits obtained by the defendant in working on the plaintiff's land for the period of the trespass in question and relying on the case of *Villa Putra Management Corp v Mayland View Sdn Bhd* [2015] 9 MLJ 779; [2014] 1 LNS 1096 and *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359.

[11] The plaintiff had, inter alia, submitted as follows:

> 11.4 The Defendant had been occupying the said Land for the purpose of planting oil palms and had therefore profited from the trespass and as such, the Plaintiff is entitled to claim from the Defendant the profits it had made from the trespass.
>
> 11.5 The measure of damages is therefore not what the Plaintiff had lost but **the benefit of gain** the Defendant had obtained by having use of the property. The Plaintiff is not required to show proof of any damages. The Plaintiff will be claiming for damages on the profits made by the Defendant and also for exemplary damages

for depriving the Plaintiff of the use of her own land with complete disregard to the feelings of the Plaintiff and it was to maximize the profits. (Bold is the plaintiff's.)

[12] I find merits in the submissions by learned counsel for the defendant that the plaintiff's now stand is contradictory to what was pleaded in her amended statement of claim, opening speech and the evidence led during the trial.

[13] To elaborate, in para 12 of her amended statement of claim, the plaintiff had averred as follows:

12. The Plaintiff had no choice but to start the writ in order to gain back the possession of the said land from the Defendant and also to claim damages from the Defendant for trespass over the years. *The Plaintiff had suffered damages and loss from the trespass of the said land because she had been deprived of the use of her rightful land over the years*. (Emphasis added.)

[14] In his opening statement (encl 118), learned counsel for the plaintiff stated the following:

3. ... The Plaintiff will rely on the testimony of the expert *to show the damages she had suffered due to being deprived of the use of her own land. The Plaintiff's evidence will show that she would have been able to make a profit if she had been able to enter into her own land to develop it into an oil palm estate*. (Emphasis added.)

[15] PW1, the plaintiff's expert witness testified (Q&A 10, PW1-WS) that he was instructed to prepare an expert report on the following:

(1) analyze the costs of the production of the Plaintiff's land;

(2) the expected yields for the size of the Plaintiff's land planted with oil palms; and

(3) the profits which the Plaintiff could have made if she had cultivated the land by herself.

[16] PW2, the plaintiff's husband also testified as to the plaintiff's intention on the use of the land, that is to cultivate it into an oil palm estate and that had the defendant not kept them from the land, they would have been able to enjoy the income from selling the oil palm fruits after three or four years of planting (Q&A 7, PW2-WS).

[17] As can be discerned from the above, the plaintiff's claim for damages is very much grounded upon the allegation that she had been deprived of the use of the land and not that the defendant had profited from using the land.

[18] Learned counsel for the defendant submitted that having elected to claim as such, the plaintiff is precluded from retracting and is estopped from retreating from the position she has adopted by the election citing the Court of Appeal case of *Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225; [2007] 1 CLJ 1 and *Lim Ah Moi v Ams Periasamy a/l Suppiah Pillay* [1997] 3 MLJ 323 as support.

[19] In response to the defendant's contentions, the plaintiff submitted that there was no difference between the two measures of damages and that the plaintiff should be awarded for the trespass even without proof of damage.

[20] As the plaintiff had heavily relied on the case of *Villa Putra* and *Penarth* to contend as such, it would be of assistance to consider the facts of these cases.

[21] In *Villa Putra*, the plaintiff claimed for damages for trespass. The plaintiff elected to claim for damages on the basis of loss of use. In deciding as to what was the applicable measure of damages, SM Komathy Suppiah JC (as she then was) considered English cases dealing with the issue namely *Ministry of Defence v Ashman* (1993) 66 P & CR 195, *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394, *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 and *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713.

[22] Her Ladyship then came to the following conclusion:

> 26. The cases quoted above illustrate that in trespass, *a plaintiff can claim for either loss of use of his land or the profit the defendant has made by using his land.* A claim for market rent for loss of use pursuant to the user principle is on the basis of the amount that the plaintiff would have obtained if he had let the property. A plaintiff seeking market rent does not have to show that he would actually have let the premises in the relevant period; *if he would not have let the property he is, in fact seeking restitution of the defendant's unjust enrichment arising from the benefit the defendant had obtained by having use of the property. He would likewise be seeking restitution of the defendant's unjust enrichment if he sought to claim the profits which the defendant actually made. The measure of damages is therefore not what the plaintiff has lost, but the benefit or gain the defendant has obtained by having use of the property.* See *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359. (Emphasis added.)

[23] In *Penarth*, the plaintiffs and the defendant had agreed for the sale and purchase of a floating pontoon then occupying part of the dock premises let to the plaintiffs. Despite the oral agreement that the defendant was to remove the pontoon as speedily as practicable or as soon as possible, the defendant failed to do resulting in the plaintiff suing the defendant for trespass and for damages.

[24] Lord Denning held as follows:

> The question which remains is, what are the damages? True it is that the Penarth company themselves would not seem to have suffered any damage to speak of. They have not to pay any extra rent to the British Transport Commission. The dock is no use to them; they would not have made any money out of it. But nevertheless, in a case of this kind as I read the law, starting with *Whitwham v Wesminster Brymno Coal and Coke Company* [1896] 2 Ch 538, on which I commented myself in the case of *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, at pp 253–254, *the test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant obtained by having the use of the berth*. (Emphasis added.)

[25] Learned counsel for the plaintiff further submitted that the plaintiff is in fact not claiming under both measures of damages but that she had elected to claim for the profits allegedly made by the defendant from the use of the land.

[26] To my mind, the issue in the present case is not whether the plaintiff is in fact claiming under both measures of damages — the plaintiff has made her election very clearly that she is seeking for the defendant's profits as damages. The question before this court is twofold: whether the plaintiff is entitled to the defendant's profits as damages and if not, whether having made such election, the plaintiff's claim for damages must fail.

[27] At the outset, I must note that the plaintiff had steered clear from using the words 'restitution' and/or 'restitutionary damages'. However, the effect of the plaintiff's claim and the reliance on the dicta by the court in *Villa Putra* leaves me no doubt that the plaintiff was, in essence, claiming for restitutionary damages as opposed to compensatory damages. This is apparent in that the plaintiff's claim of RM563,678.55 is not only made up of the sum of RM407,282.19 allegedly admitted by DW2 as being the defendant's profit gained from the land but a further sum of RM156,396.36 which the plaintiff contended was more representative of the 'actual profits' made by the defendant. In short, the plaintiff is claiming for whatever profits the defendant had gotten from the use of the land.

[28] It is, I would say, for a claim termed by Mary Lim JCA (as she then was) in *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd* [2018] 5 MLJ 255, as 'disgorgement of profits'. The appeal in that case was against the decision of the High Court in affirming the award of damages for trespass by the senior assistant registrar. In the course of deliberation as to the correct principles for measuring damages for trespass, the Court of Appeal said the following:

> [23] We do not propose to go into the question of whether the award of damages in trespass is compensatory or restitutionary depending on whether it is viewed on a 'loss' or a 'gain' basis (described as the '*Rashomon* effect' in *The User Principle* —

Rashomon Effect or Much Ado about Nothing by Kelvin FK Low (2016) 28 SAcLJ 984; see also discussions by the English Court of Appeal in *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others* [2008] 2 All ER 249; [2007] EWHC 2394 (Ch)).

[24] That discourse would be unnecessary since the respondent's allegations in this appeal (see affidavits filed in support of the assessment hearing), that the appellant had benefited from its trespass when it collected substantial sums in the sale of niches in the columbarium, were not made with a view to requiring the appellant to account profits made from the wrongful use of the land; or for a disgorgement of those profits, under the law of restitution. Those allegations were made by the respondent for the purpose of showing that the appellant was financially able to pay damages. And, this is where the learned judge fell into error when he took that into consideration without more.

[29] Although the Court of Appeal was not required to deal with the question of whether the claim was for restitutionary damages, the court's reference to the case of *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others* [2007] EWHC 2394 (Ch) offers an insight as to the reasoning and application of the principles of restitution in claims for damages in tort.

[30] There, Lewison J noted Lord Nicholls' following reasoning in *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2000] 4 All ER 385:

Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick.

[31] Lewison J further went on to state:

[80] ... He (Lord Nicholls) referred to the difficulty of aligning this measure of damages within the basic compensatory measure. He noted that the 'label' of restitutionary damages had been applied to damages calculated on this basis, although he regarded it as an 'unhappy phrase'. His conclusion was that:

> these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule (see [2000] 4 All ER 385 at p 392; [2001] AC 268 at p 279.)

[81] These observations do not, in my judgment, support the view that Lord Nicholls was supporting a restitutionary award based on the defendant's personal gain. In the price or hire cases, the damages have been assessed as user damages. This is an objective measure and is awarded where, in financial terms, the claimant has

suffered no loss. It is not a case of a claimant having suffered financial loss but having evidential difficulties in proving it. It is precisely because he has suffered no loss that the law's response is to seek a different way to compensate him for the invasion of his rights.

[82] However, Lord Nicholls went on to examine cases in which a court of equity would grant a claimant an account of profits. This went further than the common law, because the wrongdoer was required to disgorge all his gains. Equity adopted this approach in cases where it was difficult to quantify the financial loss that the victim has suffered.

[32] From my reading of *Devinish*, the reasoning behind the grant of a gains based remedy is to compensate the claimant who cannot demonstrate any identifiable financial loss.

[33] Thus, when Lord Nicholls stated in *Stoke-on-Trent City Council v W & J Wass Ltd* that the 'user principle' need not be characterised as exclusively compensatory, or exclusively restitutionary and that it combines elements of both, it cannot be taken to mean that the plaintiff is automatically entitled to the defendant's profits as what the plaintiff herein seems to suggest. This is apparent from Lord Nicholls' preceding statement in *Stoke-on-Trent City Council v W & J Wass Ltd* that 'under the user principle, he ('the trespasser') is obliged to pay a reasonable rent for the use which he has enjoyed'.

[34] Here, it is not the plaintiff's case that she did not suffer any loss so that she should be compensated by the grant a restitutionary award based on the defendant's personal gain. In fact, as shown earlier in [12]–[16] the whole tenor of the plaintiff's case was that she had suffered loss and damages arising from being deprived from the use of the land. That was the reason why PW1, the plaintiff's expert was called to give evidence (see [15] above). However, it is of significance that despite having allegedly paid PW1 the sum of RM10,000 as his professional fees (Q&A 10 & 11, notes of proceeding), the plaintiff did not rely on his conclusion at all when submitting on the damages payable by the defendant. This was hardly surprising as PW1's conclusion (p 2, exh 'P1') on the plaintiff's projected profit was much lesser:

In conclusion, based on the performance of AJCESB, the estimated average profit which the Plaintiff can make from 2001 to 2015 is RM2,857.50 per hectare x 6.229 hectares x 15 years which would amount to RM266,990.50.

[35] I must note that the cases cited by the plaintiff on this issue, ie *Villa Putra* and *Penarth* are distinguishable in that in *Villa Putra*, the plaintiff elected to claim for damages on the basis of loss of use while in *Penarth*, Lord Denning expressly noted that the benefit obtained by the defendant should not be put as high as what he would have to pay elsewhere.

[36] But there is another reason why the claim for the defendant's profits should fail in the instant case. It is trite law that the relevant principle in the law of tort is to restore the injured party to the situation which would have prevailed had no injury been sustained: *restitutio in integrum*. Further, the principle that the award of damages is not to include any element of profit similarly applies in an action for tort (see *Johandra Realty Sdn Bhd dan satu lagi lwn Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia dan satu lagi* [2020] MLJU 1972). To allow the plaintiff's claim would be contrary to these well established legal principles.

[37] Based on all of the above, I would conclude that having elected to claim for damages on the basis of loss of use, the plaintiff cannot now shift gears and claim for damages on the basis of the defendant's gains. In any event, the plaintiff's pleaded case and evidence do not support such claim. Furthermore, the fact that the plaintiff was able to identify her financial loss (through PW1's evidence) meant that there is no justifiable reason to allow her a gains based remedy.

CONCLUSION

[38] I would therefore hold that the plaintiff's claim for the sum of RM563,678.55 as 'compensatory damages', fails. Consequently, the claim for punitive and/or exemplary damages which is premised on the said sum claimed of RM563,678.55 also fails.

[39] As the plaintiff had solely anchored her claim on the defendant's profits and effectively abandoned her claim for damages for loss of use, I am constrained to dismiss the plaintiff's claim for damages with costs subject to allocatur.

Plaintiff's claim dismissed.

Reported by Mohd Kamarul Anwar